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APR 8 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 1086

JULES E. PICCARD, on behalf of himself and for the benefit of and on behalf of the defendant, The Sperry Corporation, and all other stockholders of said defendant, The Sperry Corporation, who may be similarly situated,

Petitioner,

against

THE SPERRY CORPORATION, STANDARD CAPITAL COMPANY, J. CHEEVER COWDIN, THOMAS A. MORGAN, EDWARD ALLEN PIERCE, individually and as directors and voting trustees, etc., ALEXANDER B. ROYCE and JOHN SANDERSON, individually and as directors, etc., THOMAS B. DOE, individually and as officers, etc., and J. RUSSELL FORGAN, WRIGHT DURYEA and others, individually and as partners trading under the firm name and style of FIELD GLORE & COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

A. JOSEPH GEIST,
Solicitor for Petitioner.

Of Counsel:
GEORGE E. NETTER,
HELEN M. WOLFSOHN.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Statement

This is a petition for a writ of certiorari to review a determination of the United States Circuit Court of Appeals for the Second Circuit, unanimously affirming a judgment of the United States District Court for the Southern

District of New York, dismissing the complaint upon the merits as to all defendants other than the nominal defendant The Sperry Corporation, after trial before Mr. Justice Rifkind without a jury.

This is a stockholders' derivative suit brought for the benefit of defendant The Sperry Corporation.

Facts

Defendants, Field Glore & Company, stock brokers and members of the New York Stock Exchange, were desirous of getting an option on a large and valuable block of Curtiss-Wright Corporation Class A and Common Stock owned by The Sperry Corporation.

Defendant Cowdin was a director and voting trustee of The Sperry Corporation, by whom he was employed at a salary of $1,000 per month "in representing the interests of this corporation in respect to its investment in the Curtiss-Wright Corporation" (2313-2315).* Field Glore asked Cowdin why they could not get the business of disposing of The Sperry Corporation's holding of Curtiss-Wright, particularly urging upon him that Field Glore be given an option to purchase the stock (629-631, 636-637, 653, 662, 1240-1242).

Cowdin is the dominant stockholder and president, director and voting trustee of defendant Standard Capital Company, a corporation formed and promoted by him to engage in the business of financing motion pictures (430-431, 973-999, 1358-1375).

This action is based upon the admitted fact that Field Glore agreed to give to Cowdin's company, Standard Capital, fifty percent of the substantial profits resulting to Field Glore from the option which Cowdin procured for that firm from The Sperry Corporation. Cowdin alone acted for Sperry in negotiating this option with Field

* Numerals in parenthesis refer to folios in the Record unless otherwise indicated.

Glore (449, 1282-1283). The option agreement is Exhibit 6 in evidence (2225-2239).

The actionable breach of fiduciary duty on Cowdin's part and his misrepresentation to his fellow directors with respect to his company's fifty percent interest in Field Glore's profits were found by the District Judge (2615, 2632).

Before procuring the option for Field Glore, Cowdin had obtained for them an order from The Sperry Corporation to sell 90,000 shares of Class A Curtiss-Wright stock at a minimum price of $10 a share (2318); but no stock was sold pursuant to this order as the market price never reached $10 a share before the order was replaced by the option in September, 1935 (2628; Finding No. 21). Theretofore all sales of Curtiss-Wright stock by Sperry had been made through the brokerage firm of E. A. Pierce & Co. (739, 779, 1021).

It was while Field Glore & Company were brokers under the said selling order that they arranged with Cowdin to change the selling order to an option to Field Glore to purchase and to give Cowdin's company, Standard Capital, fifty percent of their profits resulting from that option (660, 693, 1273-1277, 1544-1545, 2215; Ex. 3).

Cowdin told his fellow directors that a company in which he and Armsby, also a director of Sperry, were interested as stockholders and directors would receive from Field Glore a participation in any profits resulting from the option. The Trial Judge found that the language Cowdin used conveyed to the directors the understanding that the participation would be a small one and that he knew such was their understanding. Neither Cowdin nor the other directors regarded a fifty percent participation as a small one. None of the directors inquired and Cowdin did not disclose the name of the company to share in the profits nor the extent of its share (2632-2633; Findings of Fact Nos. 26 and 27). Sperry's officers and directors made no inquiry whatsoever with respect to this participation, either as to its size, or the reason for it, the name of the

company or the extent of Cowdin's interest in the company (805-807, 1034, 1958-1961, 1535).

Although counsel for Field Glore discussed with counsel for Sperry the fact that Standard Capital, the company in which Cowdin was interested, was to receive a participation in the profits of Field Glore, they did not mention that the participation was to be as much as fifty percent, nor did they mention that Cowdin was president of Standard Capital, and Sperry's counsel did not ask the extent of the participation or the consideration for it (1529-1531, 1537, 1541-1542). Field Glore made no disclosures to The Sperry Corporation, its officers or directors.

Field Glore exercised the option and resold the stock, realizing a total profit of $528,735.65, exclusive of commissions of $66,686.56 to Field Glore (2252-2253, 543-544). Field Glore paid Sperry $140,864.08 as the share of the profits to which it was entitled under the terms of the option agreement (2250-2253). The remaining profit of $387,871.57 was divided equally between Field Glore and Cowdin's company, $193,935.79 to each (2265-2273).

While the option to Field Glore was in existence, defendant Morgan, president, director and voting trustee of The Sperry Corporation, was induced by Cowdin to invest $5,000 in the stock of Standard Capital (1358-1365, 828). Through Cowdin, the wife of Sperry's vice-president, treasurer and director, Sanderson, also invested $5,000 in the stock of Standard Capital while the option was in existence (1358-1365, 829).

Morgan and Mrs. Sanderson, as well as Cowdin and Armsby, were thus interested in Standard Capital when Sperry's directors purported to authorize a settlement with Cowdin and Standard Capital.

Holding of the District Court

The opinion of the District Judge is reported in 48 Fed. Supp. 465.

The District Court concluded as a matter of law that there was no fiduciary relationship between Field Glore and The Sperry Corporation (2663; Conclusion of Law 6), and that Field Glore executed the option agreement in good faith and in the reasonable belief that the facts concerning the participation of Standard Capital had been disclosed to and approved by the directors of Sperry (2663; Conclusion of Law 7).

The District Court also concluded as a matter of law that the directors and officers of Sperry, other than Cowdin and Armsby, did not commit acts of waste or negligence or bad faith in approving the option agreement with Field Glore or in approving a small participation on the part of Standard Capital in the profits accruing to Field Glore out of said option agreement (2661-2662; Conclusions of Law 2 and 3).

The District Judge held that the releases subsequently given to Cowdin and Standard Capital by the same directors of Sperry who had approved the option without any inquiry about the participation in the profits by Cowdin's company, were valid and barred the action against them. This holding depends upon a holding that the releases and the settlement pursuant to which they were given were properly authorized by the valid action of a proper quorum of Sperry's directors (2596-2598, 2611, 2614).

In this connection the Court considered the provision of the Sperry charter to the effect that interested directors may be counted when present at meetings of board of directors for the purpose of determining the existence of a quorum. In what the Court considered to be an absence of controlling Delaware authority, it held that a Federal Court should not assume such charter provision to be contrary to the law of Delaware, the state of Sperry's incorporation (2610-2611).

Decision of the Circuit Court of Appeals, Second Circuit

The opinion of the Circuit Court of Appeals is reported in 152 Fed. (2d) 462. That Court unanimously affirmed the Court below, with a short per curiam opinion in which it said:

> "* * * In so far as the appeal raises questions of fact we think the findings of the trial judge are supported by the evidence; in so far as it involves questions of law we agree with his disposition of them. The judgment is affirmed on the opinion below, 48 F. Supp. 465."

Jursidiction of this Court

The decree of the Circuit Court of Appeals was entered on January 10, 1946. The jurisdiction of this Court is under Judicial Code, Section 240a, as amended (28 U. S. C. A. Sec. 347a).

Questions Involved

There was only one question of fact in this case upon which there was any conflict in the evidence, namely, whether Cowdin represented to his fellow directors that the participation in Field Glore's profits by a company in which he was interested would be a small one. The District Court has resolved that question of fact against Cowdin, and the Circuit Court of Appeals has affirmed that finding (2632; Finding No. 26) with which petitioner is not in disagreement. No disputed question of fact remains in the case.

The principal questions involved are:

1. What was the standard of duty of Field Glore in dealing with Sperry's director and sole agent, Cowdin, and

in agreeing to share equally with him through his company, Standard Capital, the profits from the option procured through him? Was not Field Glore, at the very least, under a positive duty, at its peril, to make certain that unequivocal and complete disclosure of the fifty percent participation in its profits by Cowdin's company was made to The Sperry Corporation? The Courts below have held that there was no such duty on Field Glore.

2. Were the Courts below correct in holding that there was no fiduciary relationship between Field Glore and Sperry?

3. Could Field Glore terminate their fiduciary duties as brokers by entering into an agreement with Sperry's other fiduciary, Cowdin, in conflict with their principal's interest, and without fully and unequivocally disclosing to Sperry all the facts and circumstances?

4. Did the directors of The Sperry Corporation act properly in failing to make inquiry as to the extent or reason for the participation in Field Glore's profits by Cowdin's company when they were put on notice that a company in which Cowdin was interested would share in such profits?

5. Did the Courts below err in holding that the provision of Sperry's charter permitting interested directors to be counted towards a quorum is not invalid under the law of Delaware, the state of Sperry's incorporation?

6. Did the Courts below err in failing to ascertain the law of the State of Delaware from all the available data and to apply it?

Reasons Why Writ Should Be Granted

(A) The Courts below have erroneously decided important questions of local law in a manner which is in conflict with established legal principles and decisions.

The high standards to which courts of equity have heretofore unswervingly held fiduciaries and those dealing with them are a cornerstone of the nation's structure of large corporate business and finance, and no elaboration is needed to show the extreme public importance of any decision which even tends to erode that cornerstone.

The decisions below seriously impaired the fiduciary principle of undivided loyalty to which courts of equity, both state and federal, have always adhered for the protection of corporations and others who act through agents.

The decisions below permit one dealing with a corporation through its agent to share the resulting profits of the transaction equally with the corporation's agent, without placing upon the person so dealing with the agent any duty to see to it that the facts are fully disclosed to the principal.

The seriousness of this holding is aggravated by the fact that Field Glore was a broker under the selling order and hence itself in a fiduciary relationship to Sperry when it agreed to share equally with Sperry's sole agent the profits which would result from changing that selling order to Field Glore as broker into an option to Field Glore to purchase.

Established principles of law and equity are violated by the holding below that there was no fiduciary relationship between Field Glore and Sperry.

In holding valid under Delaware law the provision of Sperry's Charter permitting interested directors to be counted towards a quorum, the decisions below seriously breach the structure erected by courts of equity to confine within proper bounds the conduct of fiduciaries, and have given judicial sanction to a device for evading fiduciary

obligations. This holding is contrary to the universal rule and is contrary to Delaware law as ascertainable from all the available data.

(B) The Courts below have erroneously decided an important question of Federal law contrary to the decisions of this Court.

In the absence of a direct holding on the question by a Delaware Court, it was the duty of the District Judge under the decisions of this Court to ascertain from all the available data the Delaware law as to the validity or invalidity of the Sperry Charter provision purporting to authorize an interested director to be counted towards a quorum and to apply the Delaware law as so ascertained by him.

Instead, the District Judge merely held that he would not assume that the charter provision was contrary to the public policy of Delaware. The Circuit Court of Appeals has affirmed this holding.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari be granted to review the aforesaid determination of the Circuit Court of Appeals for the Second Circuit.

Dated: April 8, 1946.

A. JOSEPH GEIST,
Solicitor for Petitioner.